Chapter XII

JUDICIAL REVIEW OF DMQ DECISIONS

A. Overview of Function and Updated Data

A physician whose license has been disciplined may seek judicial review of MBC's decision by filing a petition for writ of mandate (also called a "writ of administrative mandamus") in superior court under Code of Civil Procedure (CCP) section 1094.5.[242] The physician may also seek a court order staying MBC's decision pending the conclusion of the superior court's review. Under MBC's unique venue statute, a writ challenging DMQ's disciplinary decision may be filed in any city in which the Board has an office.[243]

In conducting its review of the agency's decision, the superior court sits alone, without a jury, and reviews the record of the administrative hearing (including the transcripts of the testimony that was presented at the hearing and the exhibits that were introduced). The court does not call witnesses, nor does it consider new evidence that was not introduced at the administrative hearing (except under very narrow statutory circumstances). Generally, the focus of the court's review is to determine whether the agency's findings are supported by the weight of the evidence introduced during the administrative hearing, whether the decision is supported by the findings, and/or whether the penalty imposed is within the agency's discretion or constitutes an abuse of that discretion.[244] The court exercises its independent judgment and reviews the administrative record as a whole in determining these issues. There is a presumption that the agency's decision is correct,[245] and the petitioner (the disciplined licensee or applicant denied a license) has the burden of demonstrating how the decision is invalid.

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[242] Gov't Code § 11523.

[243] Business and Professions Code section 2019 requires the Board to have an office in Sacramento, authorizes it to have offices in Los Angeles, San Diego, and San Francisco, and states that "legal proceedings against the board shall be instituted in any one of these four cities."

[244] Civ. Proc. Code § 1094.5(b).

[245] *Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 812.

If the court determines that the findings and conclusions are supported by the weight of the evidence and that the Board acted within its discretion, the court will uphold MBC's decision and deny the petition. If not, the court can grant the petition in part (with respect to those findings it does not find supported) and deny the petition in part (affirming those portions of the decision which it concludes are supported by the weight of the evidence). The court can also grant the petition altogether, explaining how the findings are not supported by the evidence, the conclusions are not supported by the findings, or how — in its opinion — the penalty constitutes an abuse of discretion. Whenever a petition is granted in whole or in part, the matter is remanded to the Board for further proceedings (the issuance of a new decision) consistent with the court's ruling. The court may not tell the Board how to exercise its discretion (in other words, it cannot specify a penalty it prefers).

Either side may challenge the superior court's decision (or any part of the decision) by filing a petition for extraordinary writ in a court of appeal.[246] Unlike a direct appeal, this procedure requires the party filing the petition to promptly file papers supporting the claim, and file the entire administrative and superior court record with the court. The appellate court has three options. If it concludes the petition lacks merit on its face and does not believe additional briefing would be helpful, it may summarily deny the writ on the merits, thus obviating the need for oral argument and a written opinion. In most instances, however, the court issues an alternative writ. When an alternate writ is issued, the parties engage in full briefing, the court entertains oral argument, and it issues a written decision. The court also has the option of summarily granting the writ (reversing the lower court's decision without further input from the parties), but this has not been yet been done by a court reviewing a superior court's decision concerning physician discipline. Although the procedure for judicial review of physician discipline has been expedited by this "extraordinary writ" process, the appellate court still uses the same standard of review it does for direct appeals: It determines whether the superior court's findings are supported by substantial evidence and are correct on matters of law.[247]

The appellate court's decision may be appealed to the California Supreme Court. Such review is entirely discretionary and is rarely attempted or granted.

Exhibit XII-A below presents the number of DMQ disciplinary decisions appealed to a court in each year indicated. It also reveals the number of decisions issued in those years in which either MBC prevailed or the respondent prevailed.[248]

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[246] Bus. & Prof. Code § 2337.

[247] The constitutionality of the "extraordinary writ" mechanism, which was added by SB 609 (Rosenthal) in 1995, was upheld by the California Supreme Court in *Leone v. Medical Board of California* (2000) 22 Cal. 4th 660.

[248] Note that the number of decisions upholding DMQ orders or reversing/remanding them in a given year does not match the number appealed during that year. The number of court rulings on DMQ decisions applies to a different universe of cases that were appealed in prior years. We present these figures only to give the reader an idea of how MBC fares when its disciplinary decisions are reviewed by the courts.

Ex. XII-A. Judicial Review of DMQ Decisions

	FY 2001-02	FY 2002-03	FY 2003-04	FY 2004-05
DMQ decisions appealed to:				
Superior Court	**23**	**24**	**19**	**20**
Court of Appeal	**5**	**8**	**6**	**5**
Supreme Court	**2**	**3**	**2**	**2**
DMQ decisions upheld by:				
Superior Court	**16**	**16**	**5**	**12**
Court of Appeal	**5**	**4**	**5**	**3**
Supreme Court	**1**	**2**	**2**	**2**
DMQ decisions reversed/remanded/vacated by:				
Superior Court	**16**	**13**	**12**	**6**
Court of Appeal	**1**	**1**	**0**	**1**
Supreme Court	**0**	**0**	**1**	**0**

Source: Medical Board of California

Exhibit XII-B below presents the average number of days from the filing of a petition for writ of mandate in a superior court until the superior court's decision; it also indicates the number of DMQ decisions that were stayed by the superior court — that is, their effective date was postponed — pending the conclusion of superior court review.

Ex. XII-B. Cycle Time and Stay Rate: Superior Court Review of DMQ Decisions

	FY 2001–02	FY 2002–03	FY 2003–04	FY 2004-05
Percentage of writ cases in which superior court stayed DMQ decision	34.7%	37.5%	47.3%	23%
Average days from filing of petition ➜ superior court ruling	357 days	375 days	409 days	270 days

Source: Medical Board of California

B. The Monitor's Findings and MBC/Legislative Responses

The following summarizes the Monitor's *Initial Report* findings and concerns about judicial review of DMQ decisions, and documents the responses to those findings implemented by the Medical Board and the Legislature. More detail on each of the findings is available in Chapter XII of the *Initial Report*.[249]

Note also that the source of these figures is the Medical Board, whose Discipline Coordination Unit (DCU) closely tracks the status and disposition of every matter transmitted from MBC to HQE. DCU must undertake this tracking function because — as mentioned repeatedly above — the computer systems of MBC and HQE are separate (and HQE's ProLaw system does not reliably contain data on events occurring before July 2004). Thus, DCU tracks these cases, and DCU depends on the HQE DAG handling a writ matter to inform DCU that a writ has been filed and its subsequent disposition. These data represent the number and disposition of writs transmitted to DCU.

[249] *Initial Report*, *supra* note 13, at 201–03.

1. MBC's venue statute is encouraging "forum-shopping" and inefficient use of judicial resources, and is unnecessarily costing HQE and MBC substantial amounts of money each year.

In the *Initial Report*, the Monitor noted that Business and Professions Code section 2019 governs venue for the filing of a petition of writ of mandate challenging a DMQ disciplinary decision. Under section 2019 (which is unique to MBC), a respondent who is unhappy with a DMQ disciplinary decision may file a petition for writ of mandate in San Diego, Los Angeles, Sacramento, or San Francisco — regardless of where the administrative hearing was held and regardless of where the HQE DAG who prosecuted the case works.

This statute has led to apparent "forum-shopping" on the part of defense counsel in search of a sympathetic judge. The *Initial Report* revealed that, of 24 writs filed in 2002–03, only eight were filed in the same city where the administrative hearing was held and the HQE DAG works; the remaining 16 (66%) of them were filed in different cities. Eleven of those 16 cases were filed in Sacramento. During 2003–04, of 19 writs filed, only five were filed in the same city where the administrative hearing was held and the HQE DAG works; the remaining 14 (74%) were filed in different cities. Ten of those 14 writ cases were filed in Sacramento. The 2004–05 data are no different: Of 20 writs filed, only six were filed in the same city where the hearing was held. Fourteen writs (70%) were filed in different cities, and eight of those were filed in Sacramento.

Section 2019 requires HQE to fly its DAGs all over the state for writ hearings. In the Monitor's view, this practice disrupts the efficient operation of the Attorney General's Office; unfairly overburdens one court funded by the taxpayers of a single county, while other courts are relatively unused by MBC petitioners[250]; and undermines the integrity of the process. In Recommendation #46, the Monitor suggested that section 2019 be amended to require legal proceedings challenging DMQ decisions to be instituted in the large city closest to where the administrative proceeding was held.

As noted in Chapter IV above, until August 30, 2005, SB 231 contained an amendment to section 2019 that would have implemented Recommendation #46. However, the amendment was

[250] See *In re Roberts* (2005) 36 Cal. 4th 575. In this case, the California Supreme Court determined that the proper venue for writs of habeas corpus filed by prisoners is the county in which they were convicted, not the county of confinement. The court held that locating venue in the county of confinement would require courts in small counties in which correctional facilities happen to be located to "process a disproportionate number of petitions for writ of habeas corpus relative to their population and their number of felony commitments. . . . By contrast, certain other counties — large in population and in their number of felony convictions, but having comparatively few (or no) prison facilities — resolve a fraction of the habeas corpus petitions filed statewide by inmates in state custody that is small in relation to their share of the state's population and total felony convictions. Thus, such counties do not share proportionately in expending the court resources required to adjudicate these petitions." *Id*. at 591–92.

opposed by CMA and various defense attorneys who represent physicians before MBC; they raised questions regarding the Monitor's "forum-shopping" conclusion. Because this matter warrants further discussion, the amendment was eventually dropped from the bill.

2. MBC is inappropriately subsidizing the cost of the preparation of administrative hearing transcripts for writ proceedings.

Under Code of Civil Procedure section 1094.5, a disciplined physician who wishes to challenge MBC's decision by filing a petition for writ of mandate must first request the preparation of the hearing transcript by OAH. If the physician petitioner prevails, section 1094.5 requires MBC to reimburse him for the cost of the transcript. Although section 1094.5 expressly states that "the cost of preparing the transcript shall be borne by petitioner," two sections of the Government Code cap the amount that must be paid by the petitioner and require the agency (here, MBC) to pay the rest. In the *Initial Report*,[251] the Monitor found that Government Code section 11523 forces the Medical Board to improperly cross-subsidize the cost of preparing hearing transcripts to the tune of thousands of dollars per transcript. In Recommendation #47, the Monitor urged the amendment of section 11523 to require the petitioner to pay the entire cost of the transcript up front.

Section 23 of SB 231 amends Government Code section 11523 to require a petitioner to pay the full cost of hearing transcript preparation to OAH. The amendment preserves the petitioner's right to full reimbursement of this cost if the petitioner prevails in the writ proceeding, and does not affect the right of *in forma pauperis* (indigent) petitioners to a free copy of the transcript under Code of Civil Procedure section 1094.5 and Government Code section 68511.3.

[251] *Initial Report*, *supra* note 13, at 202–03.